Supreme Court, U.S.
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No. 10-433

In The
Supreme Court of the United States

ROTHE DEVELOPMENT CORPORATION,

Petitioner,

v.

DEPARTMENT OF DEFENSE and DEPARTMENT OF THE AIR FORCE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

Pursuant to Sup. Ct. R. 15.6, Petitioner Rothe Development Corporation ("Rothe") respectfully submits this Reply to Respondents Department of Defense and Department of the Air Force's ("Defense") Brief in Opposition to Rothe's Petition for Writ of Certiorari.

SUMMARY

Systemic tensions pervade this case. The harm to individuals challenging federally-sanctioned racial discrimination if certiorari is not granted elevates those tensions to a level of national import that cries out for resolution. All of the untenable conflicts associated with the continued authorization and defense of unconstitutional statutory racial classifications by the Legislative and Executive branches, in the face of this Court's precedent in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (*Adarand*), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (*Croson*), among other cases, are squarely presented here. They include:

(1) The intolerable effect of federally sanctioned racial discrimination, versus the corresponding necessity of individual litigation to cease the federal government's unconstitutional acts.

(2) The presumptively unconstitutional and exceptional nature of racial classifications, as recognized by this Court, versus an alleged outright presumption of

substantial justification in the government's favor when defending the constitutionality of federal statutes, which does not exist, but is nonetheless urged by Defense and was sanctioned by the lower courts here.

(3) The presumptively unconstitutional and exceptional nature of racial classifications, as recognized by this Court, versus the purportedly exceptional situation in which the government's defense of the constitutionality of a federal statute fails the "substantially justified" test under EAJA, as characterized by various courts of appeals.

(4) The *evidentiary predicate* for a statutory racial classification required to justify enactment or reauthorization by the "compelling interest" prong of strict scrutiny, as defined by this Court, versus the assessment of whether "the position of the United States" was "substantially justified" under EAJA. A conflict of law exists between this Court's strict scrutiny requirements pursuant to *Croson* and *Adarand*, which the government could never meet here, and the less than rational basis evaluation under EAJA here.

(5) The categorically unjustifiable nature of proven unconstitutional racial discrimination, versus the designation of those same acts as substantially justified under EAJA.

This case is the ideal vehicle, and contains a perfect record, for a lasting resolution of the foregoing systemic tensions that must be eliminated.

Defense's Brief in Opposition does not acknowledge or engage these systemic tensions, which are rooted in conflicts between the lower court rulings in this case and the precedent of this Court and the precedent of other courts of appeals, as well as conflict among and between that precedent. Pet. at 16, 31-33, 37.

That certain systemic tensions have been clearly identified in the case law by existing members of this Court is reason enough to grant certiorari. *See e.g.*, Pet. at 20, 31-33 *citing Taucher v. Brown-Hruska*, 396 F.3d 1168, 1174-1175 (D.C. Cir. 2005) (Roberts, J.) (tension arising from Executive's defense of federal statutes, Congress' evidentiary responsibilities when enacting federal statutes, and whether there is or should be any resulting presumption under EAJA), and *Grace v. Burger*, 763 F.2d 457, 458 n. 5 (D.C. Cir. 1985) (R. Ginsburg, J.) (same tension). Those tensions are at their maximum where, as here, strict scrutiny and its countervailing presumption of unconstitutionality applies to a statutory racial classification. Pet. at 31.

The alternative of leaving the tensions unresolved poses enough fundamental challenge to the viability of basic concepts of fairness, substantial justice, and congruence in our constitutional system to merit resolution in its own right. Pet. at 12, 13, 16, 31-33, 37.

ARGUMENT

1. Defense does not address how this case is in tension with cases from this Court and the courts of appeals holding that EAJA intends to incentivize the vindication of constitutional rights through individual litigation.

This Court has recognized that the enactment and reauthorization of racial classifications by the Congress is an action "potentially so harmful to the entire body politic," that it requires the most detailed, exacting connection between justification and classification demanded by our Constitution. *Adarand*, 515 U.S. at 229 & 236.

A statutory enactment or reauthorization is a deliberate, intentional act, notwithstanding the lack of procedural care shown by the Congress in this case as noted in the Federal Circuit's opinion on merits. Pet. at 22-24 (citing Pet. App. 62, 76, 83).

As such, the enactment or reauthorization of statutory racial classifications is the most overt expression of federally-sanctioned racial discrimination that can occur. This Court cannot leave this contingency to the whims of racial politics.

The resulting racial discrimination, codified in the racial classification on the face of the statute and applied to individuals by Executive agencies, is easily among the most egregious forms of unconstitutional governmental action when not supported by the required "compelling interest" evidentiary predicate. *See Adarand*, 515 U.S. at 229 ("the most exact connection between justification and classification," is required under strict scrutiny). Where such justification is not present as required at the time of enactment, the extent of the harm caused by unconstitutional racial discrimination will be correspondingly more severe than nearly all other unlawful or unconstitutional federal actions, as it was for the statute overturned here.

Such egregious actions by the Congress and the Executive demand that the individual either acquiesce or resort to litigation to vindicate her rights under the equal protection component of the Fifth Amendment right to due process.

The latter option, litigation, is what Suzanne Patenaude, owner of Rothe Development Corporation chose, after Defense applied the positively draconian practice of adjusting Rothe's offer price upward by ten percent on account of the fact that she was not a member of a Congressionally preferred race codified in a statutory racial classification. Pet. at 6; Resp. Br. at 2, 4.

The policy behind EAJA is to encourage litigants of limited means and all races to vindicate their rights by challenging federal actions that they might otherwise be forced to acquiesce to in order to

avoid paying the costs of litigation. *E.g.*, *INS v. Jean*, 496 U.S. 154, 164-165 (1990) (Stevens, J. unanimous opinion of the Court) ("The Government's general interest in protecting the federal fisc *is subordinate to the specific statutory goals* of encouraging private parties to vindicate their rights and curbing excessive regulation and the unreasonable exercise of Government authority.") (emphasis added); *Sullivan v. Hudson*, 490 U.S. 877, 883-884 (1989); *Pierce v. Underwood*, 487 U.S. 552, 575 (1988) (Brennan J., concurring); *Herron v. Bowen*, 788 F.2d 1127, 1129 (5th Cir. 1986). The decisions of the lower courts in this case directly conflict with this widely recognized, and frankly, intuitive expression of intent. The Court should grant certiorari to restore the proper balance.

EAJA's intent is also lost in Defense's Brief. The only conclusion that can be drawn from Defense's Brief is that when a plaintiff is deprived of rights pursuant to an Act of Congress or a statutory classification, EAJA will never apply, and the federal government will always be substantially justified when the Attorney General *chooses* to defend the statute. Resp. Br. at 17.

Defense thus attempts to vest the Attorney General with unlimited discretion to unilaterally determine when the federal government is "substantially justified" when defending an Act of Congress or a statutory classification. Under Defense's view, the determination of whether "a reasonable basis in fact and law" exists to justify an Act of Congress or a statutory classification depends

on how the Attorney General views the facts and the law, even if the Attorney General is wrong. *Id.*

That is no different from the district court vesting itself with the unlimited discretion to determine what constitutes a "reasonable basis . . . in law" for the statutory racial classifications in this case, which it exercised with unconstitutional impunity violative and in conflict with strict scrutiny. The district court characterized its own vacated and/or reversed opinions, which were wrong on the law and incorrectly held that the intolerable statutory racial classifications were constitutional, as a "string of successes." Pet at 11, *citing* Pet. App. at 13. Such transparent evasion of EAJA's intent, and the requirements of strict scrutiny, calls for an exercise of supervisory power by this Court. It is of national importance that this error be reversed.

2. Defense does not engage what it says are the conflicting presumptions applicable to this case.

Statutory racial classifications, like other forms of racial classifications, are presumptively unconstitutional. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 736 (2003); *see also Adarand*, 515 U.S. at 224 (requiring congruence between analyses of federal and non-federal racial classifications).

Race "so seldom provide[s] a relevant basis for disparate treatment." *Adarand*, 515 U.S. at 228. "Unless Congress clearly articulates the need and

basis for a racial classification, and also tailors the classification to its justification, the Court should not uphold this kind of statute." *Id.* at 229. "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Community Schools v. Seattle School Dist. No.1*, 551 U.S. 701, 748 (2007).

Defense, however, urges a "presumption that the government is substantially justified when it defends the constitutionality of federal statutes," and purportedly derives that presumption from the constitution. Resp. Br. at 17. Such a presumption has been squarely rejected by the courts of appeals. *Taucher*, 396 F.3d at 1175 ("We do not rule . . . that the government is forever and always 'substantially justified' in defending in court the constitutionality of an act of Congress, whatever the statute may say, and on any ground a legal mind might conceive.") (Roberts, J.), *quoting* Grace, 763 F.2d at 458 (R. Ginsburg, J.).

Prior rejection of Defense's EAJA presumption by two sitting members of this Court shows the tension such a presumption would create with the presumption of unconstitutionality applicable to statutory racial classifications on the merits. It is impossible and unacceptable for Congress or Defense to receive deference under EAJA that they would not be entitled to on the merits. *See Parents Involved*, 551 U.S. at 744 ("Such deference is fundamentally at odds with our equal protection jurisprudence."); *Adarand*, 515 U.S. at 217-18.

In an attempt to mask the significant lacuna in their Brief with respect to conflicting presumptions on the merits and (allegedly) under EAJA, Defense offers two half page string citations, in an attempt to keep the conflicting presumptions apart. Resp. Br. at 13-14 & 15-16. None of these cases assist Defense's position, because none of them involved federal acts subject to strict scrutiny.[1] Obviously, the tension present here was not presented and could not have been in those cases.

Defense unabashedly creates a diversion from the conflicting presumptions, arguing that it is always presumptively substantially justified in defending any Act of Congress or statutory classification, regardless of whether a contrary presumption on the merits exists. Resp. Br. at 17. Thus, Defense attempts to mischaracterize Rothe's argument as limited to the opposite result, where EAJA's "substantially justified" standard would equate to the standard of review on the merits. Resp. Br. at 14-15 & 17. Under such a categorical rule, the position of the United States would be presumptively unjustified when a plaintiff succeeds in invalidating a statutory racial classification.

Defense's argument lacks relevance, because Rothe's argument is not as limited as Defense suggests. *See* Pet. at 15-18 (addressing the problems with a "rule of degree"). There is room here for the Court to resolve the tensions short of a categorical

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[1] All of Defense's First Amendment cases, in particular, are intermediate scrutiny cases or involve time, place, and manner restrictions subject to rational basis review. Resp. Br. at 16-17.

rule and Rothe discussed that issue at length in its petition. *See* Pet. at (i) & 13-33. Further, EAJA presumes that attorney's fees and expenses "shall" be awarded, and it is Defense's burden to prove the United States was substantially justified under 28 U.S.C. § 2412(d)(1)(A). *E.g.*, *Taucher*, 396 F.3d at 1173. In that sense, the position of the United States is already presumptively unjustified, whether the case involves a statutory racial classification or some other federal action subject to lesser scrutiny. What is still needed is for the Court to clarify Defense's proper burden in this heightened scrutiny case.

Defense underscores the confusion and tension it created when conflicting presumptions exist between the merits and EAJA. The Court should grant certiorari to provide clear guidance to the lower courts for this and the multitude of other cases involving heightened levels of judicial scrutiny for federal acts. Pet. at 33. This is an issue of national importance to all parties.

3. Defense does not engage the conflicting presumptions present in the precedent of the courts of appeals.

A presumption of unconstitutionality applies to statutory racial classifications, as noted previously. Yet some EAJA cases state a countervailing presumption that "situations in which the government's defense of the constitutionality of a federal statute fails the 'substantially justified' test [under EAJA] should be exceptional." *Grace*, 763 F.2d at 458 n. 5 (R. Ginsburg, J.); *cf.* Resp. Br. at 16 (citing only this latter presumption). This thinking

cannot trump strict scrutiny or EAJA itself. *See Jean*, 496 U.S. at 164-165.

Defense fails to address the tension between these two conflicting presumptions. Instead, Defense ducks this second question presented by Rothe's petition entirely with irrelevant string citations. Resp. Br. at 13-14 & 15-16.

Defense purports to rely on *Pierce*'s standard, whether "a reasonable person could think [the position of the United States] correct," 487 U.S. at 566 n.2; Resp. Br. at 14 n.2. But Defense eviscerates the standard, transforming it into a subjective inquiry for the Attorney General and the district court. Resp. Br. at 14 n.2.

Pierce requires the position of the United States to have a "reasonable basis *both in law and fact*." 487 U.S. at 565. A reasonable basis *in law* is an objective standard. That objective standard is strict scrutiny, with its counter-presumption of unconstitutionality and required evidentiary predicate for statutory racial classifications.

A "reasonable basis . . . in law," *Pierce*, 487 U.S. at 565 is a mandatory objective standard, not a subjective standard. Yet it was not applied as part of the "substantially justified" analysis here.

On the merits in this case, *none* of Defense's evidence had the scope or the probative value required by law for a compelling interest. Pet. App. at 63, 75-78.

Yet the lower courts in their EAJA orders in this case did not give any consideration to the role of the "compelling interest" evidentiary predicate in their assessment of whether "the position of the United States" was "substantially justified" under EAJA.

Further, the ongoing refusal of Congress and the Executive to acquiesce to this Court's holdings as to the required scope and probative value of evidence necessary for justification indicates that the United States continues to believe that the enactment, reauthorization, and defense of statutory racial classifications that lack the required scope or probity of evidence is substantially justified. That is unacceptable and requires this Court's intervention. Pet. at 19-29.

4. Defense does not address the tension caused by deeming a statutory racial classification "substantially justified" after litigation when its *evidentiary predicate* is set by Congress before litigation and is held to lack a reasonable basis in law.

Ironically, Defense purports to support its proposed subjective test for a "reasonable basis . . . in law" by pointing to its alleged "string of successes" in the district court. Resp. Br. at 14 n.2. Of course, the district court had a subjective view of the law for ten years and three opinions, and by its own pronouncement still does. R.656. Yet the district court's view of the law was consistently wrong and it was vacated and/or reversed decisively on the law

every time, particularly in the final opinion on the merits. Pet. at 5-10; *Id.* at 9 n.4.

The excuse from the district court for ten years and three opinions erroneously granting summary judgment to Defense was that this Court, through the Federal Circuit, didn't do a good enough job telling Congress and the Executive what to do. R.656.

That excuse only underscores further conflict with this Court's precedents. The evidentiary predicate for the statutory racial classification here was set by Congress at the time of enactment and repeated throughout by unconstitutional reauthorization. Pet. at 5. It was not something the Executive, or Defense or the Attorney General in particular, could change. They were clearly dealt a bad hand on all levels legal and objective and refused to acknowledge it.

The conflict culminates upon the unitary case rule's command that the "position of the United States" immediately preceding "substantially justified" in 28 U.S.C. § 2412(d)(1)(A) is to be read as singular. *Jean*, 496 U.S. at 159. The position is established when Congress enacts or reauthorizes *any* suspect statutory classification, and does not change. Pet. at 20, 35. It does not depend on Defense's purported "string of successes" in the incorrect and irrelevant opinions of the district court. *Id.* Thus, there is nothing factbound about this question presented in Rothe's petition upon which any reasonable mind could differ. *Cf.* Resp. Br. at 18-20.

5. Defense ignores the social and legal implications of deeming unconstitutional racial discrimination to be substantially justified.

Likely most importantly, from a systemic perspective, deeming Defense's racial discrimination "substantially justified" under EAJA and denying Rothe its litigation expenses is an inequitable result that transcends the boundaries of morality, shared history, and common sense. The resolution to the tensions identified herein is not to allow the district court or the Attorney General to self-define what a "reasonable basis . . . in law" is for a statutory racial classification subject to the highest judicial scrutiny. Rather, the resolution is to render a judgment ensuring, categorically or as an articulated standard, that an EAJA award should be made when a "reasonable basis . . . in law" is not present in heightened scrutiny cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: December 14, 2010

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